

**U.S. Department of Labor**

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**Issue Date: 29 October 2003**

CASE NO.: 2003-AIR-00025

In the Matter of:

**DAVID D. LEBO**  
Complainant

v.

**PIEDMONT-HAWTHORNE**  
Respondent

**DECISION AND ORDER**

This matter arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (the Act), as implemented by 29 C.F.R. 1979 (2002). This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration (FAA) or any other provision of Federal law relating to air carrier safety. 49 U.S.C. § 42121(a).

**PROCEDURAL BACKGROUND**

David D. Lebo (Complainant) was employed by Piedmont-Hawthorne (Respondent) as an aircraft mechanic until his termination on September 16, 2002. On October 24, 2002 Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor, alleging that Respondent had discriminated against him in violation of Section 42121 of the Act.

On March 12, 2003, after an investigation of the complaint, the Regional Investigator for OSHA notified the parties that he found no violation of the Act's employee protection provisions. On April 4, 2003, Complainant objected to the findings and requested an administrative hearing pursuant to 49 U.S.C. § 42121(b)(2)(A).

A Notice of Hearing dated April 17, 2003 was issued setting a hearing date of May 8, 2003. At the May 8, 2003 hearing Complainant's attorney requested and received a continuance. In a Notice of Rescheduled Hearing dated June 3, 2003, the hearing was scheduled for July 15

and 16, 2003 in Winston-Salem, North Carolina. The hearing was held as scheduled and a deadline for post-hearing briefs was set for September 18, 2003.

### **Complainant's Statement of Case**

Complainant alleges that his employment with Respondent was terminated as a result of his providing Respondent with information relating to "violations or alleged violations of FAA rules and standards relating to maintenance practices and record-keeping." (CB 2).<sup>1</sup>

### **Respondent's Statement of Case**

Respondent argues that it did not terminate Complainant in response to his allegations of maintenance and record-keeping violations. Instead, Respondent claims it terminated Complainant as a result of legitimate, non-discriminatory reasons: the post-suspension discovery that Complainant's work performance was grossly substandard, his statement that he deliberately performed his work improperly, and his failure to seek assistance. Further, Respondent claims that even if found to have terminated Complainant at least in part because of his protected activities it would have terminated Complainant anyway solely as a result of his poor work performance. (RB 25).

### **ISSUES**

1. Was Complainant engaged in activity protected under the Act?
2. If Complainant engaged in protected activity, was Respondent aware of this activity and did this awareness contribute to Respondent's decision to terminate Complainant's employment?
3. If Complainant's protected activity is found to have contributed to his termination, has Respondent demonstrated by clear and convincing evidence that it would have terminated Complainant even in the absence of the protected activity?

### **SUMMARY OF DOCUMENTARY EVIDENCE AND TESTIMONY**

My decision in this case is based on the sworn testimony presented at the hearing and the following documents admitted into evidence: CX 1 to CX 11, RX 1 to RX 6, RX 8, and JX 1. RX 7 was excluded at the hearing. The relevant evidence and testimony is summarized below.

### **EXHIBITS**

CX 3

Complainant's January 23, 2001 six month performance review, signed by Complainant and Roger Bullins, Respondent's service manager. The performance review indicates that

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<sup>1</sup> Abbreviations used throughout this decision and order include: "CB" for Complainant's brief, "CX" for Complainant's exhibit, "RB" for Respondent's brief, "RX" for Respondent's exhibit, "JX" for joint exhibit, and "TR" for the transcript of the July 15-16, 2003 hearing.

Complainant received “satisfactory” ratings in each of the ten different criteria listed on the form. “[S]atisfactory” was the highest rating, with “unsatisfactory” being the other possible rating. In the review Bullins commented that Complainant was doing a “good job in the aircraft shop.” He also commented that Complainant “[is] doing a satisfactory job with the airline on-call maintenance, [and] work[s] overtime if needed.”

CX 4

Complainant’s February 23, 2002 annual performance evaluation by Bullins. The potential performance evaluation ratings were “below standards,” “as expected,” “commendable,” and “exceptional.” Bullins rated Complainant very high in the “commendable” range, just below “exceptional.” Complainant had no incidences of tardiness. Bullins noted that Complainant performed quality work and that his performance was “very commendable.”

CX 5

Memo dated September 12, 2002. The memo describes the disciplinary action taken against Complainant following his work on Beachjet N455DW. The memo indicates that Complainant worked on N455DW from September 4-11, 2002 and that he was provided with all necessary paperwork. It also states that after Complainant completed his task, Johnson determined that he had not performed it correctly and that Respondent “would be forced to do the work over at a sizeable cost.” The memo states that as a result, Complainant would be suspended without pay from September 13 through 20, 2002. The memo was signed by Roger Bullins, Rick Buffkin, Joe Johnson, and Complainant.

CX 6

Email from Complainant to Carol Bates, Respondent’s head of human relations, dated September 16, 2002. In this email, Complainant indicated that his termination was inconsistent “with company policies and was unjustified.”

Email from Complainant to Bates, dated September 18, 2002. Complainant alleged that Johnson, Complainant’s direct supervisor, had improperly documented an inspection and had forged Complainant’s name on a work order.

A second email dated September 18, 2002 from Complainant to Bates. Complainant stated that he had told Johnson early on during his work on N455DW that he was having difficulties and that Johnson insisted that he continue working. Complainant said that he related his difficulties to assistant crew leader Fred Parmesano and shop foreman Rick Buffkin. Complainant alleged that Johnson had approved for continued use a damaged windshield on N455DW without first confirming that the windshield was safe.

CX 7

Letter from Complainant to OSHA, dated December 29, 2002. In this letter Complainant alleged that he was terminated as a result of accusing Johnson of falsifying records. Complainant stated that he was not provided with proper instructions to complete his task and that Johnson prevented him from obtaining the proper instructions. He claimed that he had alerted Johnson as to his difficulties and that he did not have enough assistance or

the correct tools, but Johnson instructed him to continue in his efforts. On September 10, 2002 Complainant notified Johnson that he had reached a point where he could progress no further installing the aircraft's thrust reverser bumper pads.<sup>2</sup> The following day Johnson asked him to sign off on the task. Complainant stated that he had never claimed that his work was completed. He also stated that his suspension was based on Johnson's false statements and that his suspension was only converted to a termination after Complainant notified Bullins of Johnson's alleged falsifications.

#### CX 8

November 5, 2002 letter from Richard O'Donnell, aviation safety inspector for the FAA, to Christian Sasfai, Respondent's general manager. O'Donnell stated that his office had received anonymous complaints regarding inspection and record keeping irregularities by Respondent. According to the letter, an investigation was carried out based on the complaint's accusations but O'Donnell concluded "that there was no credible evidence to substantiate the claims made by the complainant." However, the letter does note that the investigation identified "some areas of concern" in Respondent's quality department.

February 12, 2003 letter from Gene Kirkendall, manager of FAA's Whistleblower Protection Program, to Complainant. Kirkendall's letter states that his investigation had "not established a violation of an order, regulation, or standard relating to air carrier safety" and that as a result the FAA was closing its investigation.

#### CX 10 at 1-3

November 12, 2002 memo and March 10, 2003 affidavit by Roger Bullins, Respondent's service manager. Bullins' memo, titled "Reason for termination," states that Complainant had been assigned in the task of installing new thrust reverser pads on N455DW. An inspection of the finished work indicated that Complainant had not properly performed the task. The directions supplied to Complainant indicated that there were to be no gaps but Complainant's work exhibited gaps. Bullins' memo states that he then told Johnson, Buffkin, and chief inspector Paul Gay that the work would have to be re-done as a result of these gaps. When asked why he had not performed the task as indicated in the directions, Complainant insisted that there was nothing wrong with the work as he had carried it out. Bullins then had another mechanic remove the pads. Once the pads were removed, Bullins realized that the pads' mounting holes had been over-drilled by Complainant. Following this discovery, Buffkin, along with Bullins and Johnson, decided to suspend Complainant for one week. The cost of re-doing Complainant's work was approximately \$3,600.

In his affidavit Bullins stated that his purpose in writing the affidavit was to provide information he did not, in his prior statements, realize was pertinent. The additional information Bullins included his claims that: Complainant initially denied that there was anything wrong with his work; Complainant later admitted to performing his work incorrectly to make a point; immediately after being suspended, Complainant accused

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<sup>2</sup> The thrust reverser bumper pads are variously referred to in the record as "stop blocks," "bumper pads," and "bumpers." In the interest of simplicity I will refer to them throughout this decision as "pads."

Johnson of falsifying records; Complainant's accusations against Johnson had no impact on the termination decision; Complainant's termination was only based on his work.

CX 10 at 4-6

March 10, 2003 affidavit and November 11, 2002 memo by Rich Buffkin, Respondent's assistant service manager. In his memo, titled "Circumstances leading to [Complainant] being terminated," Buffkin stated that Complainant had indicated that he had completed the pad installation and had asked Johnson to inspect it. Complainant never asked for any assistance or further instructions in completing the pad installation. Upon inspection Johnson discovered that Complainant had over-drilled the pad mounting holes, requiring Respondent to re-do the work utilizing new parts at a sizeable cost. When questioned as to why he had performed his work incorrectly, Complainant replied that 'he did not have time to argue with them about these problems.' Based on Complainant's performance and his attitude, Respondent elected to terminate Complainant. The work was re-done without any difficulties and within the specifications indicated in the directions.

Buffkin's affidavit, as with Bullins', also indicates that his motivation in writing it was to provide information he did not believe was pertinent to his previous statement. This information included that he had provided Complainant with some minor assistance in installing that pads and that Complainant never indicated that he was having difficulties. After visually inspecting Complainant's work, Bullins and Buffkin decided to suspend Complainant for one week. At the meeting where Complainant received his suspension, he claimed to have been "making a point" when he performed the installation in an improper manner. At the same meeting Complainant also accused Johnson of having falsified records. Buffkin concluded his affidavit by stating that Complainant's accusations against Johnson did not influence the decision to terminate Complainant, but that the decision to terminate Complainant was solely based on poor work performance.

CX 10 at 7-9

March 10, 2003 affidavit and undated memo by Joe Johnson, Jr., Respondent's crew chief. In the memo, Johnson stated that Complainant never indicated to him or anyone else on their crew that he was having difficulties in completing the pad installation. When he had finished the installation, Complainant asked Johnson to inspect his work. Johnson realized that Complainant had performed it incorrectly but Complainant insisted that the installation "would be fine." Bullins confirmed Johnson's opinion and when questioned again, Complainant stated that he did not have time to argue. The following day another mechanic and Johnson discovered that Complainant had over-drilled the pad mounting holes and had not applied primer to the pads prior to installing them, as called for in the instructions.

Johnson's affidavit states that its purpose was to provide additional information he did not previously think was pertinent. Johnson describes Complainant as a "borderline" employee, in part because of his "limited knowledge of planes." He also repeated the assertion that Complainant had claimed to have performed the pad installation incorrectly to make a point.

CX 10 at 10

November 12, 2002 memo by Paul Gay, Respondent's chief inspector. Gay's memo states that he inspected Complainant's work on the pads and concluded that it "would most likely have resulted in premature failure had it not been addressed." Gay said he then instructed Buffkin to remove the pads and replace them with new pads. When this replacement was being carried out, Gay determined that Complainant had performed a poor job in riveting the pads.

CX 10 at 11

November 12, 2002 memo from Christian Sasfai, Respondent's general manager, to Carol Bates, Respondent's head of human resources. Sasfai's memo states that Complainant had been supplied with the appropriate documents to complete the pad installation. Further, a representative of N455DW's owner, upon inspecting the work performed by Complainant, insisted that Complainant be barred from working on any other of the owner's aircraft. Complainant's poor execution of the pad installation required Respondent to completely re-do his work at a cost of approximately \$3,600. Complainant was terminated on September 16, 2002 "[a]s a result of the substandard work and his attempt to knowingly submit substandard work for acceptance by an inspector..."

RX 1

March 12, 2003 Final Investigative Report by A. Dale Boyd, FAA regional investigator. The report states that Complainant's claim to the FAA was that he was terminated as a result of notifying Respondent's management about FAA violations. He had alerted Johnson that he was having difficulties installing the pads but Johnson encouraged him to continue working on the task. Respondent claimed that Complainant was terminated for the deliberate performance of substandard work. The body of the report as supplied in the record recites Complainant's statements to the FAA but appears to be incomplete and does not include a conclusion.

RX 6

Robert Kohl's annual performance evaluation for the period of December 1, 2001 through November 30, 2002. The evaluation indicates that Kohl was performing "As Expected" for the time period in question.

RX 8

Rohr Industries service bulletin MU 40078-1, April 10, 1989 revision. This bulletin is the set of printed directions for the replacement of the thrust reverser pads on N455DW. The instructions were approved by the FAA. They project that replacement of the pads on each of the airplane's two engines requires 18.7 man hours, or a total of 37.4 hours for the entire aircraft. They do not state that the rivets should be driven with wet primer. The only liquids mentioned in the instructions are methyl isobutyl ketone and Alodine 1200, which are respectively listed as a solvent and a solution. They are not mentioned in reference to driving rivets but are mentioned in step #46 for use if grinding is done on the

pads. The bulletin indicates that the pads can be ground in order that they make sufficient contact.

## **TESTIMONY**

### David Lebo

Mr. Lebo, Complainant, testified that he began working for Respondent on August 8, 2000 as an airframe and powerplant mechanic. (TR16). He stated that his educational background includes a two year degree in aircraft repair from Guilford Technical Community College and a three month heavy structure program with Timco. (TR 15). Complainant also stated that he has certifications allowing him to work on the aircraft of companies such as Allegheny Airlines, Trans States Airlines, Potomac Air, Mesaba Air, Continental Express, American Airlines, Atlantic Coast Airlines and Delta's COM Air. (TR 17, 18, 19, 22, 23). In addition to his regular duties as a mechanic for Respondent, Complainant performed on-call maintenance duties for Respondent. On-call maintenance occurred outside of normal business hours and was performed for air carriers that did not have in-house maintenance support at the Greensboro, NC airport. Performing on-call maintenance required that he be available twenty-four hours every day. (TR 20, 25). In July 2002 Respondent appointed Complainant as head of on-call training. Complainant testified that during his term of employment he received two positive performance reviews from Bullins. In the summer of 2002, Johnson became Complainant's crew chief. (TR 32). Complainant and Johnson experienced inter-personal difficulties and Complainant alleged that Johnson frequently asked him to "cut corners." Complainant discussed his concerns with Bullins. (TR 33).

In early September of 2002, Complainant began work on a Beachjet owned by Dudley Walker with call number N455DW. (TR 36). The jet was at Respondent for a "D" check, whereby it would undergo an extensive series of inspections. (TR 37). Other Respondent employees working on N455DW were Johnson, Rick Buffkin, Don Funk, Robert Kohl, Roger Miller, David Fultz and Fred Parmesano. (TR 37, 38). Complainant was assigned the tasks disassembling its seats and interior walls and inspecting the jet's interior, and replacing the pads on the jet's two reverse thrusters. (TR 37, 39). Johnson provided Complainant with paperwork for the replacement of the pads and directed Parmesano to provide Complainant with assistance. (TR 39, 40). The installation required two people to complete and Complainant first asked Kohl and then Parmesano and Buffkin to provide assistance. (TR 40, 43). Complainant had difficulty attaching the pads using the type of rivet indicated in the directions but Johnson did not permit him to use a more suitable type of rivet. (TR 43-45). Complainant told Johnson and others working on N455DW that he was having difficulty mounting the pads. (TR 43-45). On approximately September 11, 2002, Complainant explained to Johnson that he had completed as much of the project as he could and that Johnson should examine it and determine out how he wished to proceed in completing the project. (TR 46). Johnson subsequently approached Complainant and said that he was satisfied with Complainant's work on the pads and that Complainant should sign for his work. Complainant disagreed and refused to sign. (TR 47). On approximately September 12, 2002 Johnson questioned Complainant as to why he had not correctly completed his installation of the pads, discussing the issue in a manner that incorrectly

indicated Complainant had done the work completely by himself. (TR 47). At approximately 4:30pm on the same day, Buffkin, accompanied by Johnson and Bullins, issued Complainant a suspension letter. (TR 51); (CX 5). Complainant responded that Johnson was incorrect in stating that Complainant had done the work by himself in a "sloppy" manner. (TR 51). Complainant also related Johnson's request that Complainant sign off on the uncompleted work and falsification of records regarding the inspection of N455DW's interior. (TR 52). As a result of the suspension, Complainant was not allowed to work from September 13 through 20, 2002, during which time he was also not allowed to undertake on-call assignments. (TR 52). When Complainant returned to the site in the evening of the 13<sup>th</sup> in order to collect his tools, he encountered general manager Sasfai. They discussed the events leading to his suspension, including Johnson's request that he falsify records. (TR 53). The following Monday, September 17, 2003, Buffkin called Complainant and asked him to come into his office. Upon Complainant's arrival Buffkin notified him that he was terminated. (TR 54). Complainant spoke again with Sasfai and reiterated his claims regarding Johnson's actions. Complainant's employment following termination from Respondent has included five to six weeks working for Air Tran at the Baltimore Washington International Airport for approximately \$4,000 and four months working for TEMCO, also for approximately \$4,000. (TR 66, 67). Complainant is currently employed at the Patuxent Navy Station working as Bell helicopter mechanic for the United States Marine Corps. (TR 15). Complainant incurred additional expenses for travel and storage of personal items as a result of his termination from Respondent. (TR 68- 76). He concluded his testimony by stating that he never claimed to have done substandard work in order to make a point and that he had never falsified maintenance records. (TR 78).

On cross examination, Complainant stated that he was terminated for complaining that Johnson had falsified inspection records on N455DW. (TR 83). Complainant initially contacted the FAA on September 12 and 13, 2002, prior to his termination. Complainant did acknowledge that the FAA's letter to Sasfai following its investigation of Complainant's allegations stated that the allegations were found to be unsubstantiated. (TR 92). Complainant worked on N455DW for a total of eight days. (TR 105). Although he had not previously performed the task of replacing reverse thruster pads, he felt FAA clearance was not required to use a type of rivet other than specified by the instructions. (TR 106). Complainant again claimed that he had not been supplied with adequate instructions to complete the replacement of the pads and was not initially supplied with the correct tool to mount the pads. (TR 109, 118). Complainant said that he had told Bullins that he could not mount the new pads without there being a gap, but admitted under further examination that he could have done the task without the gaps. (TR 130). He did not know while performing the replacement of the pads that the task would have to be redone. He would not have signed off on his work as completed. (TR 124). While working on replacing the pads, Complainant asked for help from Parmesano and Buffkin, who provided only limited assistance. (TR 136,137). Complainant did not tell Bullins, Davis or Sasfai that he was having difficulties, but claimed Johnson is lying when he says Complainant did not come to him with his problem. (TR 137). Complainant also testified that Parmesano and Buffkin were not correct in saying that they worked with Complainant for only ten minutes each. Parmesano actually assisted for half an hour and Buffkin for two. (TR 139). After completing as much of the installation as possible, Complainant said that he did not attempt to defend his work as properly performed and never said he had done the work improperly to make a point. (TR 140-141). He also stated that he had not over-drilled the pad mounting holes and that Buffkin and Bullins were lying if they say they

subsequently found the holes to be over-drilled. (TR 141). Although he was having difficulty obtaining assistance in changing the pads, he did not tell Sasfai he did not seek assistance as a result of not receiving assistance in the past. (TR 142). Complainant signed the suspension write-up not because he agreed with its contents but because he felt obligated to sign. (TR 143). Complainant did acknowledge that he was not in agreement with Sasfai's decision to add two additional mechanics to the on-call schedule as their addition would potentially reduce his income. (TR 146). His income after being terminated included the two positions which each paid approximately \$4,000 each plus a per diem. (TR 148, 150). Complainant had applied to airplane maintenance employers Cessna Citation and Gear Buck in the Greensboro areas but was not hired. (TR 151-152). He did not apply to his former employer Timco since he would "starve to death" on their pay scale. (TR 151).

On re-direct, Complainant specified that he never told Johnson or Bullins that he had finished installing the pads or that the pads were ready for final inspection. (TR 157-158).

#### Robert Kohl

Robert Kohl testified that he is an FAA-licensed airframe and powerplant mechanic who was employed by Respondent from June 2001 through June 2003. He resigned from Respondent due to disagreements with management, specifically with Bullins. (TR 160). Prior to working for Respondent, Kohl spent twenty years as an aircraft mechanic with the Navy. Kohl was part of Johnson's group inspecting N455DW. His primary task was to inspect the plane but he also helped Complainant install the rivets that held the thrust reverser pads in place. (TR 162). Complainant had been having difficulty because the task required two people carry out. Parmesano had provided some help but Complainant's request for more help from Johnson had gone unfulfilled. (TR 162, 163). Kohl recalled that Complainant was a good worker whom he had never observed deliberately performing substandard work. (TR 163). Kohl also recalled that there had been friction between Johnson and Complainant. (TR 164). During his term of employment with Respondent, Kohl had on two occasions observed and reported improperly performed inspections to Johnson and Bullins. (TR 165,173). In the first instance an engine's magnetos were not inspected but Johnson told him to move on to other projects and that someone else would do the inspection later. (TR 166). In the second instance Kohl reported that control cables had not been inspected and was again told to move on. (TR 169). In both instances Kohl later noticed that the inspection had been signed off on but he did not feel that the inspection had actually been carried out in the prescribed manner. (TR 173). On cross examination, Kohl stated that he did not know with absolute certainty that someone later did not inspect the magnetos and control cables after he had moved on. (TR 178,181). On re-direct, however, he affirmed his belief that, given the circumstances surrounding the events, the inspections were not actually carried out. (TR 183).

#### Roger Miller

Roger Miller testified that he is an FAA-certified aircraft mechanic who was employed by Respondent for less than ninety days from the end of August 2002 through mid-November 2002. (TR 187-188). He was fired in November 2002 by Buffkin for damaging a plane while towing it. (TR 188). Miller knew Complainant from working with him at a previous employer

and regarded him as an exceptional sheet metal mechanic, a conscientious worker who was not very fast but performed work that did not have to be redone. (TR 190-191). Complainant had, by Miller's observation, never intentionally failed to complete an assigned task. (TR 191). Miller worked with Complainant on N455DW and remembered that he had complained of not receiving help and had told Johnson that he was not receiving help. (TR 190). During and after his term of employment with Respondent, Miller observed deficiencies in the maintenance of several planes. In the first instance, while working for Respondent he was instructed to prepare a new battery in a manner inconsistent with established procedures. (TR 198, 199). Respondent also installed a non-specification battery cable in November 2002 in a flight school plane. (TR 206,216). Its use was signed off by Buffkin. (TR 206, 217). Miller observed that as of May 2003, while working for another employer, the temporary battery cable had not been replaced but that the plane's maintenance records inaccurately indicated that the temporary cable was new. (TR 216, 217). Miller also related the story a Mooney M-20J aircraft on which Respondent had installed incorrect front landing gear doors. (TR 199). According to Miller, the Mooney's maintenance records falsely stated that the correct doors had been utilized. (TR 200-205).

On cross-examination Miller stated that the improperly prepared battery had performed without incident, but stressed that the issue was that established procedures were not followed. (TR 220). Miller acknowledged that the problems he indicated with the inspection and maintenance of certain planes was not the responsibility of Johnson. (TR 225). Finally, Miller was terminated from Respondent after, in less than a ninety days of employment, he was involved in over \$7,500 in property damage. (TR 233).

Edward "Joe" Johnson, Jr.

Johnson testified that he began working for Respondent in August of 2000 as mechanic and inspector, becoming a crew chief in January of 2002. (TR 265-266). His experience prior to working for Respondent included five years with the Army as a helicopter mechanic and an unspecified amount of time with Twin Lakes Aviation as a fixed wing aircraft mechanic. (TR 266). Johnson testified that the FAA approved the inspection of control cables without removing all floor boards and that engine magnetos referred to by Kohl did not require annual inspection. (TR 271-273). In regards to Complainant, Johnson had worked with him for approximately one year before becoming crew chief. In May or June of 2002 Complainant was formally assigned to Johnson's crew. (TR 274). Johnson considered Complainant to be a "borderline" employee who would have been better if he had asked for help and worked more quickly. (TR 275,280). Complainant also had previous difficulties with tardiness. (TR 275). Johnson was Complainant's crew chief while working on the N455DW. (TR 281). He gave Complainant the documents necessary to complete the task of replacing the thrust reverser pads. (TR 281). If necessary, other instructions were available to Complainant at the facility but he did not ask for the instructions and did not indicate that he needed them. (TR 286). At no time did Johnson withhold documents from Complainant or discourage employees from researching maintenance manuals. (TR 287,288). Further, Complainant never indicated that he was having problems with the task or that other employees were unwilling to provide assistance. (TR 289). He also did not ask for assistance. (TR 290). When Complainant needed additional equipment to install the pads it was promptly supplied to him. (TR 290). Johnson first noticed problems with Complainant's work on the pads when Complainant asked him to inspect the work. (TR 291). Although the instructions

explicitly stated that there were not to be gaps between the pads, there were obvious gaps that rendered the pads worthless and required that the job be re-done. (TR 291). Complainant did not indicate that the job was not completed and insisted that it would be sufficient even with the gaps. (TR 292-293). Johnson had Bullins and Buffkin inspect the work. When Bullins and Buffkin asked Complainant why the job was completed incorrectly, Complaint stated that the installation could not be completed without gaps and walked away saying he had other work to do. (TR 294). He did not allege that he had not received assistance. (TR 296). Chief inspector Paul Gay then examined Complainant's work and determined that it was not sufficient. (TR 297). At the counseling meeting following the inspection Complainant said that he did not receive proper instructions from Johnson and claimed that he "installed those things just to make a point." (TR 298). Also at the meeting, Complainant alleged that Johnson had improperly approved a damaged windshield. (TR 299). But Johnson stated that Gay had addressed the windshield issue and that that he had never falsified records and had never been found to have falsified records.<sup>3</sup> (TR 297). Johnson also stated that he had never signed Complainant's name on any document. (TR 302). At the end of the meeting with Complainant, Buffkin and Bullins made the decision to suspend Complainant. (TR 303). Respondent's suspension procedure was to first suspend the employee, investigate the situation, and then decide if further action was necessary. (TR 302). The task of replacing the reverse thruster pads was then assigned to Parmesano. (TR 303). He completed the installation with minimal assistance and without gaps while using the same instructions supplied to Complainant. (TR 303,306). When Parmesano started the installation, he and Johnson discovered that Complainant had over-drilled the holes. (TR 304). The over-drilling required the use of substitute fasteners but only after receiving a special clearance from the manufacturer. (TR 304-305). After discovering the over-drilling, the decision was made to terminate Complainant, a decision in which Johnson took no part. (TR 307).

On cross examination, Johnson stated that Kohl was mistaken when he said that Complainant had asked him for assistance. (TR 314). Additionally, at the September 12, 2002 meeting at which Complainant was suspended, Complainant did not accuse him of falsifying records. (TR 316). Johnson did not know why Bullins said that Complainant had complained of Johnson falsifying records. (TR 321). Complainant only made reference to the damaged windshield. (TR 316). Complainant did state that he had done the installation improperly in order to make a point, but never said that he was not finished. (TR 317,320). However, Johnson did not include this statement by Complainant in the suspension write up. (TR 317). Johnson also did not reference this statement several weeks later in the memo he wrote describing the suspension of Complainant. (TR 325); (CX 10). Approximately six months later, on March 10, 2003, Johnson signed an affidavit in which he again described some of the events related to Complainant's suspension. In the affidavit, which Johnson approved of but did not prepare, Johnson alleged that Complainant said he had performed the work improperly to make a point. When queried as to why he had not referred to Complainant's statement prior to the affidavit, Johnson claimed to only have remembered the statement when, six months later, he was "reminiscing" about Complainant's termination. (TR 331). Regarding Complainant's general work performance, Johnson considered him to be a "borderline" mechanic who would have been a better mechanic if he had sought more assistance. (TR 336). On re-direct, Johnson clarified that the report he completed shortly after Complainant's suspension and termination did not reference the alleged

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<sup>3</sup> Johnson also stated that he did not know if Complainant had been told that the windshield had been found to be acceptable. (TR 300).

comment by Complainant because it was not meant to reflect information necessary to defend Complainant's claim against Respondent but solely to reflect the reasons why Complainant was terminated. (TR 342). Finally, Johnson said that he only learned of the degree of Complainant's errors the day after the suspension when Parmesano removed the pads installed by Complainant. (TR 343).

### Roger Bullins

Bullins testified that he began working for Respondent in July of 1978 as a floor mechanic and advanced through the rankings, becoming service manager in May of 1995. (TR 346-347). In regard to the battery cable referred to by Miller, Bullins stated that the plane would have been disabled for four to six weeks if forced to wait for a factory cable. (TR 350). He therefore installed a cable that he crafted by hand and received FAA approval for the substitution. (TR 350). Bullins affirmed that he had experienced difficulties with Complainant because Complainant did not want to share the on-call assignments with other mechanics. (TR 357). However, for business reasons Bullins had decided to utilize more mechanics for this service. (TR 357). Bullins became aware of problems with N455DW after being alerted to them by assistant manager Buffkin. When confronted, Complainant stated that he was not aware of any problems with his work and did not state that his work was not completed and was therefore not ready to be inspected. (TR 363,371). Complainant had also stated that the pad installation could not be done without producing gaps, although Bullins pointed out that the instructions stated that there were to be no gaps. (TR 363). Complainant did not indicate to Bullins that he was having difficulties in performing the installation even though an employee experiencing difficulties is supposed to seek assistance from management. (TR 363). As a result of Complainant's inadequate performance, the pad installation had to be redone. (TR 370). Complainant was then fired because of the poor quality of his pad installation and because he had said that he did the task improperly on purpose. (TR 373). Respondent's suspension procedure was to first issue the suspension, evaluate the events that lead to the suspension, and then make a determination as to whether the employee should be retained or terminated. (TR 376). Complainant was terminated only after Respondent discovered that he had improperly drilled the mounting holes for the thrust reverser pads. (TR 377). Complainant's allegation regarding Johnson falsifying documents did not play any role in Complainant's termination. (TR 372).

On cross examination Bullins stated that one of the primary reasons for terminating Complainant was Complainant's statement that he had performed the pad installation in an improper manner in order to make a point. (TR 379). Bullins did not contest Miller's accusations regarding Respondent installing the incorrect landing gear doors on the Moony plane. (TR 382). Although Bullins' November 12, 2002 memo contained the subject line "Reason for termination," it did not mention Complainant having said he completed the installation in an improper manner in order to make a point. The report also did not mention that Complainant had accused Johnson of falsifying records, though Bullins acknowledged that Complainant had made the accusations at the meeting. (TR 391-392). Bullins agreed that an employee deliberately failing to do work correctly is very significant, "about the worst thing a maintenance guy can do..." (TR 393). The alleged statement by Complainant that he intentionally performed his work incorrectly weighed heavily on Bullins decision to terminate Complainant, but was not

documented as a reason for Complainant's suspension or termination until Bullins' March 10, 2003 affidavit. (TR 393-394). Bullins did not write the affidavit but did prepare the information it was based on. (TR 394). Finally, Bullins felt that Complainant and Johnson did not get along. (TR 396).

On re-direct, Bullins affirmed his contention that Complainant had stated that he performed the installation in an improper manner in order to make a point. (TR 403). Bullins also clarified that the improperly installed pads were "probably" removed on September 13, 2003, the day after Complainant was suspended. (TR 405). However, Bullins acknowledged that his November 12, 2002 memo included a description of the removal of these pads in which they were removed on September 12, 2002, prior to Complainant being suspended, and that only after discovering the over-sized rivet holes was Complainant suspended. (TR 405-406). Bullins stated that his November 12, 2002 depiction of events was incorrect in that the removal of the pads installed by Complainant occurred on or two days after the suspension. (TR 406).

#### Christian Sasfai

Sasfai testified that he began working for Respondent in June, 1, 2002 as its Greensboro, NC general manager. (TR 407). Sasfai was not present for the meeting at which Complaint was suspended but spoke with him that evening. (TR 415,427). Complainant explained to Sasfai that he had not sought assistance and that he knew the job was not going well, but took no actions to correct the problems he encountered. (TR 415). Complainant did not state that he had not received help when asked for, but did mention that Johnson had falsified records. (TR 416,417). The following day, on September 13, 2002, four FAA investigators arrived at Respondent's site to investigate Complainant's accusations of falsification. (TR 419). They determined that the accusations were without merit. (TR 419). Complainant had made no claims of falsification prior to his suspension. (TR 422). Finally, Complainant was terminated because of the quality of his work and for no other reason. (TR 425).

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The employee protection provisions of AIR 21 are set forth at 49 U.S.C. § 42121. Subsection (a) proscribes discrimination against airline employees as follows:

No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121(a); *see also* 29 C.F.R. § 1979.102(b)(1)-(4).

The whistleblower provision set forth in the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851, contains the same burden of proof standards as those included in the Act. In 1992 Congress amended the ERA whistleblower provision. As currently established under the ERA and the Act, during OSHA's initial investigative process a complainant must establish a *prima facie* case demonstrating that his or her protected activity was a contributing factor in the unfavorable personnel action indicated in their complaint. *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999). The elements of the *prima facie* case are as follows:

- i.) [t]he employee engaged in a protected activity or conduct;
- ii.) [t]he [employer] knew, actually or constructively, that the employee engaged in the protected activity;
- iii.) [t]he employee suffered an unfavorable personnel action; and
- iv.) [t]he circumstances were sufficient to raise the inference that the protected activity was likely a contributing factor in the unfavorable action.

29 C.F.R. 1979.104(b)(1)(i-iv). The investigatory process cannot proceed without the establishment of the *prima facie* case. However, even if a *prima facie* case has been established the investigation will not proceed if the employer can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action even in the absence of the employee's protected behavior. *Id.* at 1101.

At the level of a formal hearing before an administrative law judge, the complainant must prove the same elements as required for the *prima facie* case, with the exception that complainant must prove them by a preponderance of the evidence and not by mere inference. *Trimmer*, 174 F.3d at 1101 -02; *see also Dysert v. Sec'y of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997). Only if the complainant meets his burden does the burden shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's behavior. *Trimmer* at 1102. When established these create an inference of unlawful discrimination. *Id.* "Contributing factor" has been interpreted to indicate any factor that has the tendency to influence the decision in question. *Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993). The complainant is not required to

prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action. *Id.*

Once the complainant has established by a preponderance of the evidence that the protected activity was likely a contributing factor in the adverse action, the burden shifts to the respondent. The respondent, in order to rebut complainant's assertion, must demonstrate by clear and convincing evidence that it would have taken the same adverse action even in the absence of the protected activity. 29 C.F.R. § 1979.104(c). In other words, the respondent must demonstrate by clear and convincing evidence that its motivation in undertaking the adverse action against complainant was legitimate. See *Yule v. Burns Int'l. Security Service*, Case No. 1993-ERA 12 (Sec'y May 24, 1995). Although "clear and convincing" has not been defined with precision, courts have held that as an evidentiary standard it requires a burden higher than "preponderance of the evidence" but lower than "beyond a reasonable doubt." *Id.* If respondent is able to meet this burden, the inference of discrimination is rebutted. To prevail, the complainant must then show that the rationale offered by the respondent was pretextual, i.e. not the actual motivation. *Overall v. Tennessee Valley Auth.*, Case No. 1997-ERA 53 at 13. As the Supreme Court noted in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), a rejection of an employer's proffered legitimate, nondiscriminatory explanation for adverse action permits rather than compels a finding of intentional discrimination. See also *Blow v. City of San Antonio*, 236 F.3d 293, 297 (5th Cir. 2001).

In its post-hearing brief Respondent makes reference to Complainant's *prima facie* case. (RB 9). However, as the Supreme Court observed in *United States Postal Serv. v. Aikens*, 460 U.S. 709 (1983):

Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant. The [court] has before it all the evidence it needs to decide the [ultimate question of discrimination]. 460 U.S. at 713-14, 715.

More recently, the U.S. Court of Appeals for the Eighth Circuit in *Carroll v. U.S. Department of Labor*, 78 F.3d 352, 356 (8th Cir. 1996), *aff'g Carroll v. Bechtel Power Corp.*, Case No. 1991-ERA 46 (Sec'y Feb. 15, 1995) observed:

But once the employer meets this burden of production, "the presumption raised by the *prima facie* case is rebutted, and the factual inquiry proceeds to a new level of specificity." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981). The presumption ceases to be relevant and falls out of the case. The onus is once again on the complainant to prove that the proffered legitimate reason is a mere pretext rather than the true reasons for the challenged employment action and the ultimate burden of persuasion remains with the complainant at all times. *Burdine*, 450 U.S. at 253, 256.

Accordingly, the fact that a Complainant has established a *prima facie* case becomes irrelevant. Rather, the relevant inquiry becomes whether Complainant has proven by a

preponderance of the evidence that Respondent retaliated against him for engaging in a protected activity. *Carroll* at 356.

### **1) Complainant engaged in protected activity**

A protected activity occurs when an employee:

"(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under [the Act] or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under [the Act] or any other law of the United States..."

49 U.S.C. § 42121; *see also*, 29 C.F.R. §§ 1979.102. Title 14 of the CFR, relating to aeronautics and space, states that "[t]he person approving or disapproving for return to service an aircraft...shall make an entry in the maintenance record of that equipment..." 14 C.F.R. §43.11(a). Further, 14 C.F.R. §43.12 provides that:

(a) [n]o person may make or cause to be made:

(1) Any fraudulent or intentionally false entry in any record or report that is required to be made, kept, or used to show compliance with any requirement under this part...

14 C.F.R. §43.12(a).

While it does not matter whether the allegation is ultimately substantiated, the complaint must be "grounded in conditions constituting reasonably perceived violations." *Minard v. Nerco Delamar Co.*, 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8. The alleged act must implicate safety definitively and specifically. In other words, the complainant's concern must at least "touch on" the subject matter of the related statute. *Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and, *Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994). Additionally, the standard involves an objective assessment. The subjective belief of the complainant is not sufficient. *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB Apr. 8, 1997).

In his brief, Complainant asserts that he engaged in protected activity by reporting Johnson's alleged falsifications, a violation of 14 C.F.R. §43.12(a), to Respondent's managers. Complainant testified that at the September 12, 2002 meeting he accused Respondent Johnson of

falsifying records regarding the maintenance and inspection performed on N455DW. Complainant also testified that in the evening on September 12<sup>th</sup> he made the same accusations to Sasfai. In their testimony, Respondent's managers Bullins and Sasfai confirmed that Complainant made the accusations. In addition, the November 2002 memos of Buffkin, Bullins and Sasfai state that Complainant made the accusations. The only evidence in the record indicating that Complainant did not make these accusations was provided by Johnson, who testified that Complainant did not accuse him of falsifications. However, because of the agreement on this issue between Complainant, Bullins, Buffkin and Sasfai, I find Johnson's testimony not to be credible and conclude that Complainant in fact made the accusations.

Respondent defends, asserting that Complainant's accusations do not qualify as a protected activity. Respondent claims that Complainant testified that the improper installation of the pads would not result in the failure of N455DW's thrust reversers. Because Complainant made this admission, Respondent asserts that Complainant could not have had an objectively reasonable belief that the improper installation of the pads was a safety issue. Therefore, whether or not Johnson falsified records pertaining to pad maintenance cannot be the subject of a whistleblowing claim under the Act.

For several reasons I find that Respondent's argument lacks merit. Firstly, Respondent has mischaracterized Complainant's testimony when it asserts that he admitted that improper installation of the pads was not a safety concern. At best, with respect to Respondent's argument, Complainant was indicating that the thrust reversers would not fail immediately due to improper installation of the pads. Complainant clearly indicated in his testimony that he understood that there could be negative safety consequences resulting from improper installation when he stated that "having them fall off is not a good thing." (TR 125). Secondly, as stated in *Kesterson*, the alleged protected activity is to be analyzed from an objective point of view and not the subjective point of view of the complainant. Viewed objectively, the overwhelming evidence shows that the subject matter of Complainant's accusations regarded matters related to aircraft safety. Congress and the FAA understood the risks involved when they established strict guidelines to protect the integrity of aircraft maintenance records, guidelines that applied to the replacement of the pads. This concern is demonstrated here by the FAA acting upon Complainant's accusations and launching an almost immediate investigation into Respondent's maintenance and inspection practices.<sup>4</sup> Sasfai indicated that he recognized the seriousness of the FAA's concern when he testified that by sending four inspectors instead of one the FAA had done something "very uncommon." (TR 420). Thirdly, Complainant's allegations of falsification were not limited to the thrust reverser pads but included the inspection of N455DW's control cables and windshield. Respondent has not alleged that the improper inspection of these items does not implicate safety-related issues, as they plainly would. Finally, and perhaps most obviously, Respondent is in effect asserting that the improper maintenance of an aircraft's braking system, of which the pads are components, is not a safety issue. This is clearly erroneous. I find that Complainant has therefore demonstrated that the subject matter of his allegations is objectively related to aircraft safety and therefore comes under the Act.

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<sup>4</sup> In his November 12, 2002 memo Respondent's chief inspector Paul Gay recognized a safety concern when he stated that the incorrect pad installation "would most likely have resulted in premature failure had it not been addressed." (CX 10 at 9).

In addition, Complainant's assertions, although ultimately not supported by the FAA investigation, are lent objective reasonableness through evidence of prior maintenance record falsifications by Respondent.<sup>5</sup> Miller testified that incorrect landing gear doors had been installed by Respondent on a Moony M-20J, but that the aircraft's maintenance records stated that the correct doors had been used. (TR 299-304). Respondent's maintenance manager Bullins did not dispute Miller's assertions regarding the doors or the maintenance records. (TR 382). Miller also testified as to the use of a non-standard battery cable in a flight school aircraft. (TR 206, 216). According to Miller several months after the cable was installed it was still in place but the maintenance logs, signed by Buffkin, indicated that the correct cable had been used. (TR 216-217). Bullins acknowledged that a non-standard cable had been used and claimed that the FAA had lent its approval to such use. (TR 350). However, in his testimony Bullins' did not contest Miller's claim that the maintenance record for the battery cable replacement falsely stated that the correct cable had been used. These two events support the objective reasonableness of Complainant's accusations by showing a pattern of falsification by Respondent.

Based on the foregoing, I conclude that Complainant has, by a preponderance of the evidence, proven that he engaged in a protected activity by reporting Johnson's alleged falsification of maintenance records to Respondent.

## **2) Respondent was aware of Complainant's protected activity**

In ERA cases, internal complaints made to company supervisors concerning safety and quality control have been held to be protected activities. *See Bassett v. Niagara Mohawk Power Corp.*, Case No. 1985-ERA 34 (Sec'y Sept. 28, 1993). Here, Sasfai, Bullins and Buffkin, Complainant's supervisors, stated in their testimony and writings that Complainant had accused Johnson of falsifying maintenance records. Johnson testified that Complainant had not alleged the falsification of maintenance records. However, as I found *supra*, Johnson's testimony on the issue of Complainant's protected activity is not credible.<sup>6</sup> I therefore find that Complainant has proven by a preponderance of the evidence that Respondent was aware of his protected activity.

## **3) Complainant suffered an adverse employment action**

To show the existence of an adverse employment action, Complainant must demonstrate by a preponderance of the evidence that an action taken against him had some adverse impact on his employment. *See Trimmer*, 174 F.3d at 1103 (citing *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997)). Whistleblower regulations define discrimination or adverse employment action very broadly. *See* 29 C.F.R. 24.2(b) ("Any employer is deemed to have violated the particular federal law and the regulations in this part if such employer intimidates,

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<sup>5</sup> However, Complainant's accusations did lead to the FAA finding "some areas of concern in [Respondent's] quality department." (CX 8). Complainant's specific claims were not substantiated, but thus finding shows that there may have been an underlying basis for his concerns.

<sup>6</sup> It is likely that Johnson's testimony in this matter is somewhat shaped by his documented negative personal feelings toward Complainant. Although he depicted Complainant as a "borderline employee" who had "somewhat limited knowledge of airplanes," the evidence shows that this characterization is a far from accurate. (CX 10 at 7). In fact, Complainant received high ratings in all of his reviews and was trusted by Respondent with the essentially unsupervised on-call assignments. (CX 3,4). This is hardly in keeping with a worker who needed constant supervision, as Johnson implied. (CX 10 at 7). Further, Complainant was appointed head of on-call training.

threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee because the employee has [engaged in protected activity]"). The Act provides that an employer may not "discharge . . . or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment..." as a result of the employee engaging in protected activity. 49 U.S.C. § 42121(a); *see also* 29 C.F.R. § 1979.102(a). Activities that have been found to be adverse employment actions include, but are not limited to, elimination of position, threats of termination, blacklisting, causing embarrassment and humiliation, constructive discharge, and issuance of disciplinary letters.

Complainant alleges that he suffered an adverse employment action when Respondent terminated his employment on September 16, 2002. Because the Act and other whistleblower regulations specify that the discharge of an employee constitutes an adverse employment action, I find that Complainant has proven by a preponderance of the evidence that he suffered an adverse employment action when Respondent terminated his employment on September 16, 2002.

#### **4) Complainant's protected activity was a contributing factor to the adverse employment action**

Complainant has proven by a preponderance of the evidence that he engaged in protected activity under the Act, that Respondent was aware of his protected activity, and that Respondent took adverse action against him. As Complainant has established the first three factual predicates, at question here is Complainant's proof of the final factual predicate of his case: that his protected activity was a contributing factor in the adverse action taken against him. *See* 49 U.S.C. §42121(b)(2)(B)(iii); 42 U.S.C. §5851(b)(3)(C).

As with most cases of discrimination or retaliation, the instant case lacks direct evidence of intent. *See Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 48 (3d Cir. 1989). However, a complainant is not required to demonstrate specific knowledge that the respondent had an intent to discriminate against him. Instead, the complainant may demonstrate the respondent's motivation through circumstantial evidence of discriminatory intent. *See Frady v. Tennessee Valley Authority*, 92-ERA 19 and 34, slip op. at 10 n. 7 (Sec'y Oct. 23, 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984)(quoting *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980)).

In *Timmons v. Mattingly Testing Services*, 95- ERA-40 (ARB June 21, 1996), the Board reviewed principles governing the evaluation of evidence of retaliatory intent in ERA whistleblower cases. The Board indicated that where a complainant's allegations of retaliatory intent are founded on circumstantial evidence, the fact finder must carefully evaluate all evidence pertaining to the mindset of the employer and its agents regarding the protected activity and the adverse action taken. The Board noted that there will seldom be eyewitness testimony concerning an employer's mental process. Fair adjudication of whistleblower complaints requires "full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Id.* at 5. The Board continued:

Furthermore, a complete understanding of the testimony of the witnesses, including testimony regarding technical procedures, is necessary for the drawing of pertinent inferences and the resolution of conflicts in that testimony.

*Id.* at 5-7 (citations omitted).

The Secretary has noted that, when addressing Complainant's proof of a *prima facie* case, one factor to consider is the temporal proximity of the subsequent adverse action to the time the respondent learned of the protected activity,. *Jackson v. Ketchikan Pulp Co.*, 93-WPC-7 and 8 (Sec'y Mar. 4, 1996); *Conway v. Valvoline Instant Oil Change, Inc.*, 91-SWD-4 (Sec'y Jan. 5, 1993). As I noted above, the question of a *prima facie* case at this point in the proceedings is irrelevant. I address the question of temporal proximity, however, as the timing between the protected activity and adverse employment action can be circumstantial evidence of discrimination, regardless of whether the issue is satisfaction of a *prima facie* case or otherwise.

Findings of causation based on closeness in time have ranged from two days, (*Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd.*, 91-ERA 13 (Sec'y Oct. 26, 1992), slip op. at 7), to about one year (*Thomas v. Arizona Public Service Co.*, 89-ERA-19 (Sec'y Sept. 17, 1993)). On the other hand, just as temporal proximity may be a factor in showing an inference of causation, the lack of it also is a consideration, especially if a legitimate intervening basis for the adverse action exists. *Evans v. Washington Public Power Supply System*, 95-ERA 52 (ARB Jul. 30, 1996) (citing *Williams v. Southern Coaches, Inc.*, 94-STA-44 (Sec'y Sept. 11, 1995)). In *Tracanna v. Arctic Slope Inspection Service*, ARB No. 98-168, ALJ No. 1997-WPC-1 (ARB July 31, 2001), the ARB held that temporal proximity did not always provide a reasonable inference of discrimination:

Temporal proximity may be sufficient to raise an inference of causation in an whistleblower case. *See, e.g., Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). When two events are closely related in time it is often logical to infer that the first event (e.g. protected activity) caused the last (e.g. adverse action). However, under certain circumstances even adverse action following close on the heels of protected activity may not give rise to an inference of causation. Thus, for example, where the protected activity and the adverse action are separated by an intervening event that independently could have caused the adverse action, the inference of causation is compromised. Because the intervening event reasonably could have caused the adverse action, there no longer is a logical reason to infer a causal relationship between the activity and the adverse action. Of course, other evidence may establish the link between the two despite the intervening event. As the court held in *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 (3d Cir. 2000), "we have ruled differently on this issue [raising an inference of retaliatory motive based on temporal proximity] . . . depending, of course, on how proximate the events actually were, and the context in which the issue came before us." (Emphasis added.)

Slip op. at 7-8 (footnote omitted).

The instant case is one contemplated by the decision in *Tracanna*. Complainant argues that his protected activity contributed to Respondent's adverse employment decision because of the temporal proximity between his protected activity and the adverse employment action: Complainant made his accusations on September 12, 2002 and was terminated four days later, on September 16. He reasons that he was suspended on the 12<sup>th</sup>, prior to his engaging in protected activity, and that no other event occurred between the suspension and the termination except for the protected activity. Respondent argues that discrimination is not demonstrated by temporal proximity due to the occurrence of several intervening events. Respondent first claims that between Complainant's protected activity and termination, it discovered that Complainant's work performance on N455DW was much worse than understood at the time of the suspension, namely that Complainant had over-drilled the rivet holes and had not driven the rivets with primer. Respondent also claims that after being notified of his suspension, Complainant stated that he had performed the pad installation in an improper manner in order make a point. Respondent also points to the post-suspension return of general manager Sasfai and his contribution to the decision making process as an intervening event.

### ***Over-drilled Holes***

Respondent's witnesses testified that shortly after September 12, 2002, the day on which Complainant was suspended and engaged in protected activity, it removed the pads installed by Complainant and discovered that the job Complainant performed was much worse than originally realized. Specifically, Respondent claims to have discovered that Complainant had over-drilled the holes used to mount the pads. Johnson also stated that removal of the pads showed that Complainant had failed to drive the rivets with primer, as required by the instructions. As a result of the over-drilling, Respondent was forced to obtain permission from Norden, manufacturer of the pads, to utilize larger rivets in installing replacement pads. (TR 305-307). However, the record indicates a great deal of contradiction in regard to the evidence and testimony Respondent offers in support of this discovery as an intervening event. In his November 2002 memo, service manager Bullins explained:

After the [pads] were removed I had noticed that the rivet holes were oversized from [Complainant's] previous drilling off of the original [pads]. This required us to go to oversized rivets upon installation of the new set of [pads]. At this point [Buffkin], [Johnson] and myself decided that we would send [Complainant] home for the rest of the week.

(CX 10). This order of events is confirmed by Buffkin's November 2002 memo, in which he indicates a series of events in which the discovery of the over-drilled holes occurred before the decision to suspend Complainant.<sup>7</sup> In contrast to the statements Buffkin and Bullins made in the November 2002 memos, Johnson and Bullins each testified at the hearing that the discovery of the over-drilling followed the decision that Complainant would be suspended. This degree of inconsistency regarding when the over-drilling was discovered strongly calls into question the accuracy of Respondent's version of events. The two initial and more contemporaneous written

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<sup>7</sup> Johnson, in an undated memo, placed the discovery of the over-drilled holes as taking place the day after Complainant was suspended. (CX 10). Although Johnson testified that he wrote this memo a few weeks after Complainant was terminated, I accord it little weight because it is undated. (TR 325).

statements by Bullins and Buffkin clearly explain that Respondent knew of the over-drilling and took the information into account when deciding that Complainant would be suspended. Considered in this order, the discovery of the over-drilling cannot be seen as a valid intervening event because it occurred prior to the protected activity. The later testimonial statements claim that the over-drilling was only discovered after the suspension. If accurate, this sequence of events could provide a valid intervening event because Respondent would have a potentially valid post-protected activity motivation for converting the suspension to a termination. However, the inconsistency between the memos and the later testimony is profound and the most contemporaneous accounting of events, the November 2002 memos, contradict Respondent's assertion. I therefore cannot give weight to the testimony that the discovery of the over-drilled holes took place after Complainant was suspended. I therefore find that the alleged discovery of the over-drilled holes, if it took place, occurred prior to the decision to suspend Complainant and prior to his protected activity. As a result, the alleged discovery of the over-drilled holes is not a valid intervening event but is instead pretext.

### *To make a point*

The second intervening event claimed by Respondent allegedly occurred when, at the September 12, 2002 suspension counseling meeting, Complainant declared that he had performed the installation of the pads improperly in order to make a point. Although Complainant consistently denied ever having made the statement, Respondent's witnesses Johnson and Bullins testified at the hearing and, along with Buffkin, stated in their March 10, 2003 affidavits that Complainant made the statement after having been notified that he was to be suspended. The timing of this alleged statement is crucial. Respondent's witnesses claimed that it had been made after the suspension had been given and that it provided an important part of their motivation to terminate Complainant. However, I find that the evidence is not sufficient to support Respondent's assertion regarding this alleged statement.

As pointed out by Complainant, the first documented evidence that Complainant made the statement is found in the March 10, 2003 affidavits of Bullins, Buffkin and Johnson. Bullins testified that he compiled the information contained in the affidavits, which was then compiled in the affidavits that were then presented to and approved by Johnson and Buffkin. Each affidavit stated that the information it contained had not been included in a previous statement because the writer "had been asked [in a previous statement] to generally set forth the events which led to [Complainant]'s termination and I did not believe that this information was pertinent." (CX 10). The previous statements Bullins, Buffkin and Johnson were referring to were their November 2002 memos. As I indicated *supra*, I give Johnson's memo little weight because it is undated. Buffkin's memo, with the subject line "Circumstances leading to [Complainant] being terminated," was dated November 11, 2002. Bullins memo was dated November 12, 2002 and included the subject line "Reason for termination." Although on their faces claiming to memorialize the circumstances and events leading to Complainant's termination, neither of these memos made any reference to Complainant having said that he installed the pads improperly in order to make a point. At the hearing Bullins was questioned as to why his memo, which purportedly addressed the reasons why Complainant was terminated, did not reference the alleged statement. Bullins claimed that the alleged statement was not included in his November 2002 memo because the memo was intended to address the grievance Complainant had lodged

against Respondent and to document the reasons for terminating Complainant's employment. (TR 390-391). In contrast, Bullins claimed that the reason the statement was only mentioned six months later in the affidavit was "because of the lawsuit that was brought by [Complainant]." (TR 395). This is very troubling admission by Bullins as it clearly indicates that the statement was not an actual basis for Complainant's termination but a tactic introduced by Respondent solely as a means of defense in this matter, i.e. that the statement is pretext. If it had truly been an important component in the termination decision, it most likely would have appeared in the November 2002 memos. This is especially true since Respondent's witnesses, in particular Bullins, claimed that the alleged statement was a key factor in the determination to terminate Complainant's employment. (TR 393). Further reinforcing this view was Bullins' agreement during the hearing that deliberately performing improper work was "about the worse[sp] thing that a maintenance guy could do" and that it amounted to sabotage. If Complainant had made the statement, one that Bullins claimed so greatly concerned him, it would undoubtedly have received attention prior to six months after it was allegedly made.

Also indicating that the statement was never made is Sasfai's testimony regarding the meeting at which he met with Buffkin and Bullins after the suspension to decide whether to terminate Complainant. Sasfai testified that at this meeting he, Bullins and Buffkin determined that the discovery of the over-drilled holes indicated that Complainant's work on the pads "was grossly poor and [Complainant] either didn't know what he was doing or he was intentionally trying to pass [poor workmanship] off in hopes that no one would catch it." (TR 424-425). However, if Complainant had actually said that he had intentionally performed his work improperly, there would have been no uncertainty among Respondent's managers as to whether Complainant's performance was "grossly poor" or an attempt at hiding poor workmanship: Complainant had allegedly already admitted that his errors were made purposely. It is possible that Sasfai testified as to his own impressions and at the time of the meeting was not aware that Complainant had made the statement. But, Bullins and Buffkin were key sources of information for Sasfai and it seems unlikely that such an important issue as Complainant stating that he had deliberately sabotaged an aircraft would not have been related to Sasfai. This is especially true since Bullins claimed that the statement was one of two or three primary motivations behind the termination. Taken as a whole, Sasfai's testimony indicates that the alleged statement did not contribute to the decision to terminate, or that Sasfai did not reference to Complainant having made the statement because Complainant never made it.<sup>8</sup>

As with Respondent's assertions regarding the allegedly over-drilled holes, I am left with written evidence and testimony from Respondent that is highly inconsistent. Bullins testified that the statement was one of the primary reasons Complainant was terminated and that his November 2002 memo was intended to document the reasons why Complainant was terminated. Bullins' memo, along with those of Buffkin, Johnson and Sasfai represent the most contemporaneous evidence addressing the issue of why Complainant's suspension was converted to a termination. Yet none of the memos makes any reference to the alleged statement. References do appear six months after the termination in the affidavits, but Bullins made the admission that the affidavits referenced the statement only to serve as defense against the legal

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<sup>8</sup> Given the serious nature of Respondent's claim that Complainant deliberately performed improper work on an aircraft's braking system, I am curious as to whether Respondent reported Complainant to the FFA so that it might prevent him from sabotaging other aircraft. The record does not indicate that Respondent ever took such action.

action taken by Complainant. In contrast, Complainant consistently denied ever having made the statement. Based on the foregoing, I conclude that Complainant did not make the alleged statement. Therefore, I find that the statement is pretextual and that it does not serve to sever temporal proximity between Complainant's protected activity and termination.

### ***Return of Sasfai***

In its post-hearing brief, Respondent also argues that the return of Sasfai, the general manager, was an intervening event. (RB 19). Sasfai had been off-site during the day on September 12, 2002 when Complainant was suspended, returning later in the evening. A key difficulty in accepting Sasfai's return and his influence on the decision making process is the information he relied upon in reaching his decision. Although he stated that part of his determination was based on his September 12, 2002 conversation with Complainant, he also stated that his determination in part relied on the representations made to him by Bullins and Buffkin. (TR 425). Bullins and Buffkin in turn stated that their determinations to terminate Complainant were based on discovering the over-drilled holes and Complainant's statement that he performed the installation of the pads improperly to make a point. As I have found, *supra*, the representations of Bullins and Buffkin regarding these two claimed motivations are not credible and as such constitute pretext. Because Sasfai's decision to terminate Complainant was, by his own admission, partially based on pretextual information provided by Bullins and Buffkin, his opinion is compromised in a similar fashion. Further, even if Sasfai had not in any way based his decision on the representations of Bullins and Buffkin, he was but one of three individuals taking part in the decision to terminate Complainant. Sasfai clearly stated that the decision to terminate Complainant was made by himself, Bullins and Buffkin.<sup>9</sup> (425). Therefore, even if his decision to terminate Complainant was based solely on Complainant's actual work performance and not on the pretextual reasons, that Buffkin and Bullins comprised two-thirds of the decision making process taints his decision. I therefore find that Sasfai's return and his influence on the decision making process is not a valid intervening event.

Based on the foregoing analysis, I conclude that the intervening events indicated by Respondent are pretextual. I therefore find that Complainant has proven by a preponderance of the evidence that his protected activity was a contributing factor in the adverse employment action taken against him.

### **Respondent's burden to articulate a legitimate, non-discriminatory rationale**

If a complainant demonstrates that his protected activity contributed to a respondent's adverse employment action, the respondent then has a burden to produce evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. 49 U.S.C. § 42121 (b)(2)(B)(iv). Relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. 29 C.F.R. §1979.109(a). Respondent asserts that even if I find that Complainant's protected activity was a contributing factor in its decision to terminate him, the

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<sup>9</sup> Respondent's post-hearing brief states that Sasfai's opinion carried "substantial" weight because he was the general manager. (RB 20). However, the final decision to terminate Complainant was not Sasfai's alone and the testimony does not indicate that any particular deference was given to his decision.

overwhelming evidence demonstrates that it would have terminated Complainant anyway based on his substandard performance in installing the pads and failure to seek help when he realized he was experiencing difficulty.

### *Poor Performance*

Respondent dedicated much of its post-hearing brief to its assertion that Complainant was terminated as a result of his substandard performance in installing the pads. As evidence of this substandard performance, Respondent has presented the testimony and writings of Bullins, Buffkin, Johnson, Sasfai and Gay. However, I cannot accept Respondent's claims regarding the quality of Complainant's work as a basis for his termination.

When it suspended Complainant Respondent already knew that the pads and the rivets would have to be replaced.<sup>10</sup> It also knew that additional labor expense would be incurred in re-doing Complainant's work. And, as I have found, it was aware of the over-drilled holes. In essence, at the time it elected to suspend him Respondent knew all of the costs and issues associated with correcting for Complainant's allegedly poor performance. Regarding the quality of Complainant's work, Respondent is therefore left with asserting that it would have terminated Complainant based on the quality of his work as known at the time the decision was made to suspend him. But Respondent has never made this assertion. Instead, Respondent has consistently asserted that the decision to terminate Complainant, as it regarded performance quality, hinged on the discovery of the over-drilled holes. In short, although extensive evidence and testimony was developed regarding the quality of Complainant's performance on N455DW's thrust reverser pads, Respondent has only demonstrated its basis for suspending Complainant, not for terminating him. I therefore find that Respondent has not proven by clear and convincing evidence that it would have terminated Complainant because of the allegedly poor quality of his work.

Although it is not necessary for this decision that I directly address the issue of whether Complainant's suspension was justified, there are several issues that call into question Respondent's assertions regarding the suspension. For instance, Johnson and Bullins point to Complainant's alleged incompetence by claiming that Fred Parmesano was able to re-do the pad installation in approximately one and a half days work. (TR 307). However, the instructions for the installation of the pads estimate that a total of 37.4 man-hours is required to replace the pads on both engines. (RX 8). It seems highly unlikely that Parmesano would have been able to compress a 37.4 hour task into a day and a half, especially since Respondent performed this type of work very infrequently and Bullins stated that Parmesano worked essentially by himself. (TR 363). Further, Johnson stated that one of the reasons Complainant's work was of poor quality was because he failed to drive the pad rivets with primer. (CX 10 p.9). However, the instructions, which Respondent asserts comprised all of the information Complainant needed to complete the pad installation, contain no reference to the use of primer when driving rivets.<sup>11</sup> (RX 8). That the

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<sup>10</sup> In his November 12, 2002 memo Gay stated that, as of September 13, 2002, he realized and had expressed to Buffkin that Complainant's work would have to be done "again with new parts." (CX 10 at 10). Respondent therefore knew prior to the suspension that new pads and rivets would have to be purchased.

<sup>11</sup> The only use of liquids mentioned in the service bulletin regards the treatment of the pads with methyl isobutyl ketone, a solvent, and Alodine 1200, a solution, when the pads are ground to make contact with each other. (RX 8).

instructions do not mention the use of primer raises the possibility that, as Complainant contended, he was not provided with the complete set of instructions, or that Respondent is implicating task requirements that do not exist. By any measure, the lack of primer does not appear to be supported as a valid failure on Complainant's behalf. However, as I have already stated, I will not make findings on these issues as my decision does not require me to do so.

### ***Failure to seek assistance***

Respondent also alleges that Complainant admitted that he did not know how to install the pads but did not seeking assistance. According to the testimony of Respondent's witness Sasfai, when an employee cannot carry out an assignment the correct procedure is for the employee to either seek help or stop working. (TR 426). Respondent offered the testimony of Johnson, Bullins and Sasfai, each of whom testified that Complainant admitted to not seeking assistance. Complainant countered this claim, testifying that he did seek assistance from Johnson but did not receive it. Complainant also offered the testimony of former Respondent employee Robert Kohl, who testified that Complainant specifically asked Johnson for help in installing the pads. Kohl also testified that Complainant was having difficulty because installing the pads required assistance from another person, but that the other mechanics were not giving him the degree of help he required. (TR 162). Kohl helped Complainant with some of the rivets and also observed Fred Parmesano helping Complainant install rivets. (TR 163).

I give Kohl's testimony the greatest weight in this issue. Kohl is a former employee of Respondent who resigned on his own accord and has no apparent bias in this matter. Respondent did not directly challenge the testimony provided by Kohl. In contrast, the credibility of Respondent's witnesses had been greatly diminished by their assertion of pretextual bases for terminating Complainant. Based on the unbiased testimony of Kohl, I find that Complainant did seek assistance and that Respondent therefore has not shown by clear and convincing evidence that a refusal to seek assistance by Complainant was a valid basis for its decision to terminate him.

Respondent has failed to establish, by clear and convincing evidence, the existence of legitimate, nondiscriminatory grounds for Complainant's termination. I have analyzed the grounds for termination advanced by Respondent individually, and, when I consider the evidence propounded by Respondent as a whole, I continue to find that Respondent fails to meet its burden

### **CONCLUSION**

The record demonstrates that Complainant proved by a preponderance of the evidence that his protected activity was a contributing factor to the adverse employment action he suffered. Furthermore, Respondent has not proven a legitimate, nondiscriminatory reason for Complainant's termination.

### **RELIEF**

29 C.F.R. §1979.109(b) provides:

If the administrative law judge concludes that the party charged has violated the law, the order shall direct the party charged to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. At the request of the complainant, the administrative law judge shall assess against the named person all costs and expenses (including attorneys' and expert witness fees) reasonably incurred.

Complainant seeks the following relief: 1) reinstatement to his former position and compensation; 2) back pay for the period from September 16, 2002, until September 6, 2003 of \$43,419.43 plus \$1,111.35 for each week after September 6, 2003 through the date of award; 3) reimbursement of one year of lost employee benefits, including: premiums for medical, life, long term disability and dental/vision insurances, and 401K contributions totaling \$4,503.45; 4) interest on any award at the rate specified in the Internal Revenue Code, 26 U.S.C. § 6621; 5) compensatory damages; 6) front pay for another year totaling \$43,419.43; and 7) attorney's fees and costs.

### **Back pay**

The statute and implementing regulations of the Act clearly provide for the award of back pay. 49 U.S.C. §42121(b)(3)(B)(ii); 29 C.F.R. §1979.109(b). The purpose of a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in if not discriminated against. Back pay awards should, therefore, be based on the earnings the employee would have received but for the discrimination. *See Blackburn v. Metric Constructors, Inc.*, 86-ERA 4 (Sec'y Oct. 30, 1991). A complainant has the burden of establishing the amount of back pay that a respondent owes. *See Pillow v. Bechtel Construction, Inc.*, 87-ERA-35 (Sec'y July 19, 1993). Because back pay promotes the remedial statutory purpose of making whole the victims of discrimination, "unrealistic exactitude is not required" in calculating back pay. *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 587 (2d Cir. 1976)(quoting *Hairston v. McLean Trucking Co.*, 520 F.2d 226, 233 (4th Cir. 1975)). Uncertainties in establishing the amount of back pay to be awarded are to be resolved against the discriminating party, however. *McCafferty v. Centerior Energy*, 96-ERA 6 (ARB Sept. 24, 1997). Interim earnings at a replacement job are deducted from back pay awards. *Williams v. TIW Fabrication & Machining, Inc.*, 88-SWD-3 (Sec'y June 24, 1992). Evidence that the complainant failed to mitigate damages will reduce the amount of the back pay owed. The respondent has the burden of establishing that the back pay award should be reduced because the complainant did not exercise diligence in seeking and obtaining other employment. *West v. Systems Applications International*, 94-CAA-15 (Sec'y Apr. 19, 1995). To meet this burden, the respondent must show that (1) there were substantially equivalent positions available; and (2) the complainant failed to use reasonable diligence in seeking these positions. The benefit of a doubt ordinarily goes to the complainant. Interim earnings or an amount which could be earned with reasonable diligence are reductions to a back pay award. A complainant may be "expected to check want ads, register with employment agencies, and discuss potential opportunities with friends and acquaintances." *Doyle v. Hydro Nuclear Services*, 89-ERA 22 (ARB Sept. 6, 1996).

Complainant alleges that he is entitled to back pay totaling of \$43,419.43 plus \$1,111.35 for each week after September 6, 2003 up until the date of award. (CB 23). Respondent advances that Complainant is not entitled to back pay because he failed to mitigate his damages by not seeking employment with Timco, his previous employer. (RB 29). Respondent urges that by not applying to return to Timco Complainant had decided to remain unemployed and therefore should recover no or very limited damages.<sup>12</sup>

The record, however, does not support Respondent's contention. Complainant's unchallenged testimony indicates that he sought employment from two companies in the Greensboro, NC area: Cessna Citation and Gear Buck. In regard to not re-applying to his former employer, Complainant testified that he would "starve" at the hourly rate paid by Timco. Timco's hourly rate was higher than that paid by the employment Complainant managed to secure, but Complainant reliably testified that the positions he secured included per diem allowances. These per diem allowances were especially significant to Complainant since they were not taxable and were therefore effectively higher than Timco's seemingly equivalent pay rate. The evidence therefore shows that Complainant made a good faith effort to mitigate his damages. Accordingly, I find that Complainant is entitled to back pay from his date of termination on September 16, 2001, through until the date of this decision, as limited by interim earnings. Complainant's calculation of his earnings, as detailed in his post-hearing brief, shows that he has properly taken into account his interim earnings. In addition, Complainant correctly points out that back pay normally includes pay increases that the employee would have received had they not been discriminated against. *Creekmoe v. ABB Power Systems Energy Services, Inc.*, Case No. 93-ERA 24, Sec. Dec. and Remand Order, slip op. at 21. Complainant received wage increases of 4% and 3% in February 2001 and February 2002, respectively. Based on this progression and the economic climate, Complainant's estimation of his back pay for 2003 includes an increase of 3% to an hourly rate of \$18.76, starting in March of 2003. Because Complainant's back pay calculations appear to be correct and reasonable, I find that Respondent is liable to Complainant for back pay totaling \$43,419.43 for the period through September 6, 2003 plus \$1,111.35 for any week after September 6, 2003 up until the date of this decision.

## **Interest**

A back pay award is designed to make whole the employee who has suffered economic loss as a result of an employer's illegal discrimination and the assessment of prejudgment interest is necessary to achieve this end. Prejudgment interest on back pay recovered in litigation before the Department of Labor is calculated, in accordance with 29 C.F.R. § 20.58(a), at the rate specified in the Internal Revenue Code, 26 U.S.C. § 6621. The employer is not to be relieved of interest on a back pay award because of the time elapsed during adjudication of the complaint. *See Palmer v. Western Truck Manpower, Inc.*, 85-STA-16 (Sec'y Jan. 26, 1990) (where employer

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<sup>12</sup> Respondent indicated during the hearing that Complainant's wages would have been reduced had he remained employed with Respondent because other mechanics were taking part in on-call maintenance assignments. However, Respondent's claim is not supported. The record indicates that Complainant's 2002 salary had already been affected by the addition of other mechanics to the on-call ranks. Further, fellow on-call mechanic Kohl resigned his position with Respondent, an event that conceivably would have resulted in an increase in Complainant's income. As there is obvious uncertainty in regard to this issue, I resolve it in favor of Complainant and find that his salary would not have decreased. *See McCafferty*.

has the use of money during the period of litigation, employer is not unfairly prejudiced); *Blackburn v. Metric Constructors, Inc.*, 86-ERA 4 (Sec'y Oct. 30, 1991). I therefore find that Complainant is entitled to interest on his back pay.

### **Reimbursement of lost employment benefits**

Complainant seeks the reimbursement of one year of lost employee benefits including: premiums for medical, life, long term disability and dental/vision insurances, and 401K contributions totaling \$4,503.45. (CB 25-26).

In *Creekmore v. ABB Power Systems Energy Services, Inc.*, 93-ERA 24 (Dep. Sec'y Feb. 14, 1996), the Deputy Secretary indicated that health, pension and other related benefits are terms, conditions and privileges of employment to which a successful ERA complainant is entitled from the date of a discriminatory layoff until reinstatement or declination. Such compensable damages include medical expenses incurred because of termination of medical benefits, including premiums for family medical coverage.

In *Crow v. Noble Roman's, Inc.*, 95-CAA-8 (Sec'y Feb. 26, 1996), the administrative law judge recommended that the Respondent pay, as compensatory damages, any reasonable medical costs that would have been covered under the Respondent's health insurance coverage. The Secretary observed that the Respondent is required to pay those medical costs as part of its obligation to reinstate the Complainant to his former position, together with its conditions and privileges, such as health insurance coverage. The Secretary noted that should the Complainant decline reinstatement, the Respondent would be required to reimburse the Complainant for medical costs as part of the back pay award.

### ***Insurance Premiums***

The record indicates that on Complainant's behalf Respondent paid annual premiums valued at \$93.24 for life insurance, \$87.12 for long-term disability insurance, \$3,028.68 for medical insurance, and \$387.36 for dental and vision insurance.

Courts have disagreed about the proper method of calculating the value to a complainant of lost insurance coverage. *See, e.g., Aledo-Garcia v. Puerto Rico Nat'l Guard Fund, Inc.*, 887 F.2d 354, 356 (1st Cir. 1989)(holding that cost to employer is reasonable method for calculation of value of health insurance benefits as amount of wages that could have been earned includes value of any fringe benefits, such as medical insurance, that are generally provided by employer); *Kossmann v. Calumet County*, 800 F.2d 697, 703-04 (7th Cir. 1986)(holding employer must reimburse the cost of alternate insurance actually purchased); *Weiss v. Parker Hannifan Corp.*, 747 F.Supp. 1118, 1132 (D. N.J. 1990)(awarding actual unreimbursed medical expenses). I find that, in this instance, the *Aledo-Garcia* decision allows for the most equitable solution. The value of these insurance premiums was part of Complainant's compensation while employed with Respondent and should therefore be included in his award in order to make him whole. Accordingly, I award \$3,596.40 for the value of insurance premiums

### ***401(k) Contributions by Respondent***

The record shows that Respondent matched Complainant's monthly \$126.24 401(k) deferral with a monthly contribution of \$78.90, or \$907.05 over an eleven month and two week period.<sup>13</sup> Based on the Deputy Secretary's decision in *Creekmore*, I find that Respondent must pay Complainant \$907.05 in lost 401(k) contributions.

### **Compensatory Damages**

The Act clearly contemplates the possible award of compensatory damages. 29 C.F.R. §1979.109(b). Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation. Such awards may be supported by the circumstances of the case and testimony about physical or mental consequences of retaliatory action. The testimony of medical or psychiatric experts is not necessary, but it can strengthen a Complainant's case for entitlement to compensatory damages. *See Thomas v. Arizona Public Service Co.*, 89- ERA-19 (Sec'y Sept. 17, 1993).

The following cases are indicative of instances in which compensatory damages were deemed appropriate:

*Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd.*, 91-ERA-13 (Sec'y Oct. 26, 1992). The Secretary reviewed the complainant's evidence concerning emotional distress resulting from his retaliatory discharge. Comparing the circumstances to those of other emotional distress awards, the court found that the complainant was entitled to \$10,000 in compensatory damages. Corroborated testimony showed, *inter alia*, that: 1) the complainant was without a job for five and one half months; 2) during that time he and his wife were constantly harassed by bill collectors, and had to borrow money; 3) the complainant became depressed and angry, and contemplated suicide; 4) the complainant's family life suffered; he argued with his wife over money, and he cut off contact with relatives because of embarrassment over the lack of money.

*McCuiston v. Tennessee Valley Authority*, 89-ERA 6 (Sec'y Nov. 13, 1991), slip op. at 21-22 (\$10,000 award; complainant harassed, blacklisted and fired; forfeited life, health and dental insurance; unable to find other employment; exacerbated preexisting hypertension and caused stomach problems; sleeping difficulty, exhaustion, depression and anxiety).

*DeFord v. Tennessee Valley Authority*, 81- ERA-1 (Sec'y Apr. 30, 1984), slip op. at 2-4 (\$10,000 award; medical expenses related to termination; stress, anxiety and depression for which he was still being treated at the time of the Secretary's order).

*Van der Meer v. Western Kentucky University*, ARB Case No. 97-078, ALJ Case No. 95-ERA 38, ARB Dec., Apr. 20, 1998. (\$40,000 award; Van der Meer suffered public humiliation and the respondent made a statement to a local newspaper questioning Van der Meer's mental competence).

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<sup>13</sup> Complainant in his post-hearing brief asserted that he was entitled to contributions for the two weeks remaining in September 2003 plus eleven months through September 16, 2003. (CB 26).

Although it is highly likely that Complainant experienced hardship similar to those documented in the above cited cases, he has not provided any evidence of such hardship. I therefore find that compensatory damages are not available to him.

### **Front Pay**

Front pay, which is money for future lost compensation as a result of discrimination, may be an appropriate substitute for promotion or reinstatement in certain circumstances. *Doyle v. Hydro Nuclear Servs., Inc.*, 89-ERA-22, slip op. at 2-3 (ARB Nov. 26, 1997). For example, front pay may be an appropriate substitute when the parties prove the impossibility of a productive and amicable working relationship, or the company no longer has a position for which the complainant is qualified. *Id.*

Although reinstatement is the presumptive remedy in wrongful discharge cases under the whistleblower statutes, there are circumstances in which alternative remedies are preferred. For example, front pay in lieu of reinstatement may be appropriate where the parties have demonstrated "the impossibility of a productive and amicable working relationship," *Creekmore*, slip op. at 9, or where reinstatement otherwise is not possible. *See, e.g., Doyle* (reinstatement impractical because company no longer engaged workers in the job classification occupied by complainant and had no positions for which complainant qualified); *Blackburn v. Metric Constructors, Inc.*, No. 86-ERA 4 (Sec'y Oct. 30, 1991) (Secretary reverses earlier reinstatement orders based on evidence developed on remand that company's electricians were terminated at conclusion of project with no expectation of continued employment). *Cf. Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1449 (11th Cir. 1985), *cert. denied*, 474 U.S. 1005 (in ADEA case, reinstatement, not front pay, was appropriate remedy where there was no evidence that "discord and antagonism between the parties would render reinstatement ineffective as a make-whole remedy").

Complainant has asserted that because he has only been able to earn a fraction of his former salary and because Respondent has not made an offer of reinstatement, he is entitled to a year's worth of front pay. However, the record does not indicate that such an award is appropriate. The cases contemplated *supra* are very clear in holding that front pay is only inappropriate as a substitute for reinstatement where enmity between the parties is too great to allow a productive working environment or where there no longer exists a position for which complainant is qualified. The record does demonstrate some mutual antagonism between Complainant and Johnson. However, the testimony also shows that in spite of this antagonism they remained capable of working together. Upon reinstatement this relationship may change for the worse, but for now the evidence does not support an award of back pay. I therefore find that Complainant is not entitled to front pay.

### **ORDER**

**IT IS HEREBY ORDERED** that Respondent, Piedmont-Hawthorne:

1. Reinstatement Complainant;

2. Pay to Complainant back pay and other relief in accordance with the discussion above;
3. Pay to Complainant interest on back pay from the date the payments were due as wages until the actual date of payment. The rate of interest is payable at the rate established by section 6621 of the Internal Revenue Code, 26 U.S.C. § 6621;
4. Pay to Complainant all costs and expenses, including attorney fees, reasonably incurred by them in connection with this proceeding. Thirty days is hereby allowed to Complainants' counsel for submission of an application of attorney fees. A service sheet showing that service has been made upon the respondent must accompany the application. Respondent has ten days following receipt of such application within which to file any objections.

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**PAUL H. TEITLER**

Administrative Law Judge

Cherry Hill, New Jersey

**NOTICE OF APPEAL RIGHTS:** This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1979.110 (2002), unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. Any party desiring to seek review, including judicial review, of a decision of the administrative law judge must file a written petition for review with the Board, which has been delegated the authority to act for the Secretary and issue final decisions under 29 C.F.R. Part 1979. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within fifteen (15) business days of the date of the decision of the administrative law judge. The petition must be served on all parties and on the Chief Administrative Law Judge. If a timely petition for review is filed, the decision of the administrative law judge shall become the final order of the Secretary unless the Board, within thirty (30) days of the filing of the petition, issues an order notifying the parties that the case have been accepted for review. If a case is accepted for review, the decision of the administrative law judge shall be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board. The Board will specify the terms under which any briefs are to be filed. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington,